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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 631

NORTHWEST STEEL ROLLING MILLS, INC., A WASHINGTON CORPORATION; VERNON A. GENT; AND HENRY M. RICHARDSON,

Petitioners,

vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

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vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS

To the Honorable, the Supreme Court of the United States:

Your Petitioners respectfully show:

Summary of the Matter Involved

Your petitioners, Northwest Steel Rolling Mills, Inc., a Washington corporation, Vernon A. Gent and Henry M. Richardson seek to review the judgment of the United States Emergency Court of Appeals entered on February 12, 1954 dismissing petitioners' complaint challenging the validity of certain portions of Ceiling Price Regulation 5

as it stood on November 28, 1951 (Collation 1, 16 F.R. 12000).

Petitioners are defendants in a criminal action pending in the United States District Court for the Western District of Washington, Northern Division. The criminal proceeding is Cause No. 48577 in that court. Petitioners are charged in the District Court indictment with "buying and receiving" varying amounts of:

> "Grade 34 unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". (R. 21, 22)

And paying prices therefor alleged to be in excess of those permitted by CPR 5.

The corporate petitioner is the employer of the individual petitioners and is engaged in the business of melting iron and steel scrap and converting it into steel products. The individual petitioners are subordinate employees of the corporate petitioner and their duties require them to weigh scrap brought to the plant of the corporate petitioner (R. 35).

Although CPR 5 is no longer effective for any purpose, the petitioners asked the United States Emergency Court of Appeals for a declaration that the regulation was invalid as it stood on November 28, 1951. That court not only has the power to entertain a complaint which seeks affirmative relief against a provision of an existing price regulation, but also has the power to declare that a provision of a regulation was invalid at a time in the past when the complaining party is alleged to have violated it. *Montgomery Ward & Co., Inc.* v. *Bowles,* (USECA 1945) 147 F. (2d) 858.

Subsequent to the indictment in the District Court, the petitioners were granted leave to file their complaint in the United States Emergency Court of Appeals to challenge

the validity of CPR 5 insofar as it purported to fix a maximum price for Grade 34 unprepared steel scrap (R. 40, 41). Section 408 (E) (1) of the Defense Production Act of 1950 (50 USCA App., Section 2108 (E) (1)) sets up the procedure whereby the defendant in a criminal proceeding charging violation of the provisions of a price regulation is permitted to file a complaint in the United States Emergency Court of Appeals setting forth objections to the regulation. Such leave is granted where the District Court finds that the defendants' objection to the regulation is made in good faith and where there is a reasonable and substantial excuse for the defendants' failure to present such objections in an earlier protest.

CPR 5 listed in Section 3 thereof, 34 grades of scrap of industrial origin. Opposite each grade was listed the maximum price which might be paid or charged for such grade. In the regulation the grades were divided into three separate categories. The first was designated "Open Hearth and Blast Furnance Grades" and comprised Grades 1 through 10. The second was designated "Electric Furnace and Foundry Grades" and comprised Grades 11 through 31. The last was designated "Unprepared Grades" and comprised Grades 32 through 34.

The first two categories above listed and Grades 1 through 31 were defined in detail as to dimensions and characteristics by Section 23 of CPR 5 under the heading "Specifications". However, the third category denominated "Unprepared Grades" was described only under Section 28 of CPR 5, under the heading "Definitions" as follows:

> "(n) 'Unprepared scrap'. The term shall have its customary trade meaning and shall not include demolition projects as automobiles, bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its own wheels . . .".

A careful reading of CPR 5 discloses that although Grades 1 through 31 were described in detail under Section 23 entitled "Specifications", *Grades 32 through 34 were described only by the reference to "customary trade meaning" as set forth in Section 28 above.*

In obtaining leave of the District Court to file their complaint in the United States Emergency Court of Appeals and in the latter court, the petitioners relied on and now rely on the following objections to CPR 5:

(1) By the terms of CPR 5 an indefinite and vague standard was purportedly adopted subject to fluctuation without notice to persons subject to the regulation.

(2) CPR 5 unlawfully and unconstitutionally delegated the function of defining "unprepared scrap" to private individuals.

(3) CPR 5 was ambiguous in that it purported to apply more than one ceiling price to the same scrap items (R. 37, 38, 39, 42).

Subsequent to the filing of petitioners' complaint in the United States Emergency Court of Appeals, respondent filed his answer denying generally that CPR 5 was defective in the particulars above charged (R. 43). Thereafter, upon application of the petitioners, the United States Emergency Court of Appeals authorized petitioners to introduce evidence in affidavit form relative to the customary trade meaning, if any, which had been attributed to the term "unprepared scrap" (R. 1, 2, 3).

Affidavits were filed on behalf of the petitioners by Harry Goetz, Jr. (R. 7), Manager of the corporate petitioner, and Harry Schwartz (R. 5) proprietor of the Alaska Junk Company in Seattle and past president of the Seattle Chapter of the Institute of Scrap Iron and Steel. In support of the regulation the respondent submitted the affidavit of

one David C. Holub (R. 11). In rebuttal petitioners submitted a further affidavit by Harry Goetz, Jr. (R. 19).

The basic facts set forth in petitioners' affidavits relative to the existence of any "customary trade meaning" wherein the term "unprepared scrap" might be defined are as follows:

There never has been an established trade custom whereby the limits or dimensions of articles of scrap comprising a definite group known as "unprepared" are defined (R. 5-9). Nor is it possible from the nature of the meaning given to that term by the trade that there could have been a definitive class of scrap items belonging in such category. According to trade usage, scrap is "unprepared" if not usable in a particular consumer's melting facilities without further preparation such as cutting, flattening, baling or compressing (R. 5-9). Conversely, scrap has been and is designated as "prepared" by the trade only if usable in a particular consumer's melting facilities without any further preparation of the variety above described (R. 5-9).

Accordingly, whether scrap would be deemed "prepared" or "unprepared" by the trade at large is determined solely by the usages and needs and melting facilities of the consumer who wishes to use it (R. 5-9). Stated in other words, inherent in the use of the words "prepared" or "unprepared" is a knowledge of the needs and melting facilities of the consumer using the scrap to which those adjectives are sought to be applied.

Further, because of the above circumstances, whether scrap is "prepared" or "unprepared" as to a particular consumer has been and is a matter which is subject to change and fluctuation as that consumer's needs and melting facilities may change or fluctuate. Scrap which had been denominated "prepared" by a particular consumer

would become "unprepared" as to him should he reduce the size of his melting facilities or should he, for operational reasons, desire a greater density of metal in a single furnace charge (R. 5-9).

On the other hand, should a particular consumer increase the size of his melting facilities or should he decide for operational reasons that the density of the metal in a single furnace charge might be less than that formerly used, items of scrap which had theretofore been "unprepared" as to him, would become "prepared" because requiring no further handling by the consumer prior to use (R. 5-9).

The needs and melting facilities of consumers of iron and steel scrap may and do differ widely. Accordingly, scrap items which are "unprepared" as to one consumer, beause requiring further preparation by him prior to use, are nevertheless "prepared" as to another whose furnace may be larger or whose operational procedures may differ (R. 5-9).

The largest of the two electric furnaces operated by the corporate petitioners has only a 10-foot diameter inner shell with a rounded bottom. In order to give a maximum density charge in a furnace of that size, in order to eliminate additional charges and to reduce melting time, scrap items, to be "prepared" as to the corporate petitioners' melting operation, must not only conform to the necessary requirements as to thickness, but may not be more than 18 inches in maximum dimension (R. 6-9). Accordingly, although scrap items may conform in every respect to the specifications for Grades 3 and 4 of the Open Hearth and Blast Furnace Grades or to the specifications for Grades 11, 12, 13, 16, 17 of Electric Furnace and Foundry Grades, such scrap items may nevertheless be "unprepared" as to petitioner, Northwest Steel Rolling Mills, Inc., because requiring further preparation prior to use by it (R. 5-9).

The position of the respondent's witness Holub, on the other hand, may be summarized as follows:

Section 28(n) of CPR 5 did not purport to furnish a definition of "unprepared scrap". It only had been taken to mean that in accordance with trade usage, unprepared scrap did not include demolition projects (R. 13, 16). On the other hand, if the regulation was read to mean that Section 28(n) purported to define "unprepared scrap" the definition therein contained relative to "customary trade meaning" was sufficient, for in fact, according to "customary trade meaning" all grades of scrap not included within the specifications for Grades 1-31 contained in the regulation had been regarded by the trade as "unprepared" (R. 13, 14). It was Mr. Holub's position that the regulation, on its face, indicated that the unprepared grades (Grades 32-34) contained everything not set forth in the specifications for the prepared grades, but that even if such an inference could not be drawn from a reading of the regulation itself, that trade custom established that such was the fact.

Mr. Holub denied that scrap was prepared or unprepared depending upon whether, without further preparation, it was suitable for facilities of any specific consumer (R. 16).

It is significant that the petitioners' position relative to the trade custom, if any, from which the meaning of the term "unprepared scrap" might be ascertained, is directly and substantially confirmed by a statement made by the Director of Price Stabilization on October 17, 1952 prefacing a later amendment to the regulation here challenged. In his "Statement of Considerations" preceding Amendment 11 to CPR 5 (17 F. R. 9240) the Director of Price Stabilization said:

> "In the absence of such a regulation as CPR 5, each consumer determines, according to his own individual requirements what scrap he wishes to accept. It is

> customary for all purchase contracts of iron and steel to contain the proviso that such scrap must be 'suitable and acceptable to the consumer'. The superintendent of the furnaces, either in his own discretion or on orders from his superiors, will determine what is suitable and acceptable, taking into consideration their melting practices, the steel to be produced from the melt, the reliability of the shipper and source of the scrap and the availability of scrap and pig iron in the market."

On the forgeoing evidence and on written briefs filed by the respective parties the United States Emergency Court of Appeals refused to find CPR 5 unconstitutionally vague and indefinite. In a written opinion filed on February 12, 1954 (R. 45), the Emergency Court stated that although the regulation did not describe Grades 1-31 as "prepared grades", the fact that Grades 32-34 were described as "unprepared grades" indicated to the reader that the Grades 1-31 were "prepared" (R. 51). From this assumption, the court reasoned that the regulation meant that all grades not included within the specifications for Grades 1-31 must have been the "unprepared grades". Further, in support of this reasoning, the court found that the evidence submitted by the respondent supported the contention that the customary trade meaning given to the term "unprepared scrap" established that unprepared scrap was everything not conforming to the specifications for Grades 1-31 of CPR 5 (R. 51). The court on February 12, 1954 entered its opinion and judgment (R. 53) directing the dismissal of petitioners' complaint.

Jurisdiction

Jurisdiction of this Court is invoked under Title 50, U. S. C. App. Sec. 2108(d) and under Title 28, U. S. C. Section 1254(1).

Questions Presented

1. Does a provision of a price regulation referring those subject thereto to "customary trade meaning" for a definition of commodities for which prices are therein prescribed satisfy the requirements of the Fifth and Sixth Amendments to the United States Constitution? Does such a law, penal in nature, deprive those subject thereto of liberty or property without due process of law? Does such a law violate the right of an accused to be informed of the nature and cause of the accusation against him?

2. Does a price regulation which refers simply to "customary trade meaning" for a definition of commodities for which prices are therein specified, unlawfully and unconstitutionally delegate to private individuals the function of law making so as to deprive those persons subject thereto of rights safeguarded by the due process clause of the Fifth Amendment of the United States Constitution?

3. May an administrative officer such as the Director of Price Stabilization constitutionally leave to courts and juries in criminal proceedings brought under price regulations the task of determining the *existence* of a "customary trade meaning" and the *nature* thereof as a condition precedent to ascertaining the guilt or innocence of the accused in such a criminal proceeding?

4. Can the guilt or innocence of an accused in a criminal proceeding rest on the determination of conflicting testimony of experts as to the meaning of terms used in the law under which the defendant is charged?

5. May a citizen subject to a price regulation be referred to a comprehensive study of economic and trade conditions in order to arrive at the meaning of terms used in such a regulation, and must those subject to such a regulation guess at their peril whether commodities purchased by them

come within the definitions of terms contained in such a regulation?

6. Is a price regulation unconstitutionally vague and ambiguous which on its face prescribes more than one ceiling price for the same item and furnishes no explanation as to how the ambiguity is to be resolved?

Reasons for the Allowance of the Writ

The reasons relied upon by petitioners for allowance of the Writ are as follows:

1. It is well understood that price regulations, although not presently in effect, are carefully kept and preserved for future use. In the event of a national emergency it is common practice for regulations which may have been applicable during an earlier emergency to be brought out, dusted off and used without change. An example of this situation was the recent Korean conflict. When government regulations were imposed under the Defense Production Act of 1950 in many instances the Price Stabilization Administration used regulations which had formerly been enforced during World War II. Under such a situation, it is highly important that constitutional challenges to the validity of a former regulation be resolved to avoid controversy in the future.

2. Irrespective of specific regulations the practice of the Director of Price Stabilization of referring to "customary trade meaning" for definitions of commodities whose prices are regulated should be examined and clarified. It is concededly a difficult task in times of emergency to adequately cover all areas and commodities in need of regulation. Nevertheless, the Director of Price Stabilization must be governed by some sufficient standards in order to protect the basic rights and constitutional guarantees of our citizens. A ruling by this court as to the acceptability of the

practice herein employed by the Director of Price Stabilization is desirable and necessary for the guidance of future administrative officers who may be confronted with the task of promulgating regulations in another emergency.

3. The matters presented in this case are novel since to the petitioners' knowledge no decision of this Court has ever been rendered specifically dealing with the right of the administrator to simply refer to "customary trade meaning" in providing those subject to a regulation with a definition of items therein regulated.

4. It is only in this proceeding that the corporate and individual petitioners may challenge the validity of the regulation with a violation of which they are charged in the criminal proceeding *Yakus* v. *United States* (1944), 321 U. S. 414, 88 L. Ed. 834, Title 50 U. S. C. App., § 2108(d). As matters presently stand under the opinion of the United States Emergency Court of Appeals (R. 45) the District Court, in a trial of the criminal proceeding, will be required to submit to the jury the conflicting testimony of experts for determination of the question whether the term "unprepared scrap" has any "customary trade meaning" and if so whether the articles purchased by petitioners constituted "unprepared scrap" according to that meaning as found. Whether a jury may constitutionally be left to determine the meaning of terms used in the law under which the defendant is charged is an important federal question which should be settled by this Court prior to a trial of this criminal proceeding or future proceedings brought under similar regulations.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue from this Court directed to the United States Emergencey Court of Appeals to the end that the opinion and judgment of the United States Emergency Court of Appeals holding that the petitioners' complaint should be dis-

missed, may be reviewed and determined by this Court and that the judgment below dismissing petitioners' complaint be reversed by this Court and that the petitioners have such other and further relief as this Court may deem proper.

Dated this 12th day of March, 1954.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
DE WITT WILLIAMS,
WILLIAM A. HELSELL,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 631

NORTHWEST STEEL ROLLING MILLS, INC., A WASHINGTON CORPORATION; VERNON A. GENT; AND HENRY M. RICHARDSON,

Petitioners,

vs.

CHARLES H. KENDALL, ASSISTANT ADMINISTRATOR ECONOMIC STABILIZATION AGENCY,

Respondent

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the United States Emergency Court of Appeals is Cause No. 635 before that court and is not yet found in the official reports. The opinion is set forth in full, however, at (R. 45-52, inclusive). The Order of the United States District Court for the Western District of Washington, Northern Division, granting to petitioners leave to file their complaint with the Emergency Court of Appeals is set forth as an exhibit to the petitioners' complaint (R. 40, 41).

Jurisdiction

The opinion and judgment of the United States Emergency Court of Appeals was rendered February 12, 1954. No petition for rehearing was filed. The statutory provisions sustaining jurisdiction of this court are Title 50, U. S. C. App. Section 2108 (d) and Title 28, U. S. C. Section 1254 (1)

Statement of the Case

The corporate petitioner, Northwest Steel Rolling Mills, Inc., is a Washington corporation engaged in the business of melting iron and steel scraps into ingots and then rolling those ingots into steel bars. In connection with its business activity the corporate petitioner purchases steel scrap on the open market. The individual petitioners are subordinate employees of the corporate petitioner and their duties required them to weigh scrap brought to the plant of the corporate petitioner (R. 35). The petitioners here are defendants in a criminal suit in the United States District Court for the Western District of Washington, Northern Division, in which each of the 21 counts of the indictment charges them with buying and receiving from various sellers:

> "Grade 34 unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". (R. 21, 22)

Petitioners are charged with paying prices for such scrap alleged to be in excess of those permitted by Ceiling Price Regulation 5. *No other or further definition or description of items allegedly purchased by the petitioners is contained in the indictment.* The alleged purchases of scrap occurred during March, April and May, 1952 at which time Collation 1 of CPR 5 was in effect (16 F. R. 12000).

Leave was granted to petitioners to file their complaint

in the United States Emergency Court of Appeals pursuant to Section 408(e) (1) of the Defense Production Act of 1950 (Title 50 U. S. C., App. Section 2108(e) (1)), challenging the validity of CPR 5 insofar as it purported to fix a maximum price for Grade 34 unprepared steel scrap (R. 40, 41, 42).

Although Grades 1 through 31 set forth in CPR 5 were defined in detail as to dimensions and characteristics by Section 23 of CPR 5 under the heading "Specifications", Grades 32-34 denominated "Unprepared Grades" were described only under Section 28 of CPR 5 under the heading, "Definitions" as follows:

> "(n) 'Unprepared scrap'. The term shall have its customary trade meaning and shall not include such demolition projects as automobiles, bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its own wheels . . . "

In the case before the Emergency Court of Appeals, the petitioners challenged the validity of CPR 5 and the definition therein contained for the Grade 34 unprepared scrap (with the purchase of which petitioners are charged in the criminal proceeding) asserting that CPR 5:

> 1. Adopted a vague and indefinite standard subject to fluctuation without notice;
> 2. Unlawfully delegated the function of defining "unprepared scrap" to private individuals; and
> 3. Was ambiguous in that it purported to apply to more than one ceiling price to the same scrap items (R. 37-39, inclusive).

As is shown by the petition herein, the petitioners introduced evidence before the United States Emergency Court of Appeals in affidavit form wherein it was established that the only meaning customarily given to the term "unprepared scrap" by the trade was that whether scrap was pre-

pared or unprepared depended upon the facilities of the purchaser (R. 5-9). If scrap was of a size suitable, without further preparation, such as cutting, flattening, baling or compressing for melting in the purchaser's furnace, it was, as to him, "prepared" (R. 5-9). If, on the other hand, further preparation was necessary to make scrap suitable for a particular consumer's use, it was, in trade usage, "unprepared" as to him (R. 5-9). The needs and melting facilities of consumers generally varied and fluctuated and accordingly, scrap which might be "prepared" as to one consumer would nevertheless be "unprepared" as to another whose melting facilities might require further preparation prior to use (R. 5-9). Or, if a particular consumer should change the size of his melting facilities or alter his melting practices, scrap which had theretofore been "prepared" as to him might, by such change, become "unprepared" (R. 5-9).

The United States Emergency Court of Appeals found the regulation to be clear and unambiguous and further found that the customary trade meaning was such as to indicate that any item of scrap which did not conform to Grades 1-31 of the regulation, was regarded as "unprepared". The court arrived at its conclusion despite the fact that the melting facilities of the corporate petitioner were concededly of such size that many items of scrap, although conforming to the specifications for one of the Grades 1-31 of the regulation, nevertheless might require further preparation prior to use by the corporate petitioner, and which, according to petitioners' version of trade custom, were nevertheless unprepared as to it. A more detailed summary of the facts is set out in the preceding petition which is hereby adopted and made a part of this brief.

Specification of Errors

1. The United States Emergency Court of Appeals erred in holding that CPR 5 was not unconstitutionally vague and indefinite.

2. The court erred in holding that the evidence established, the existence of a trade custom which confirmed the contention of the government that all items of scrap not coming within the specifications of Grades 1-31 of the regulation were "unprepared".

3. The court erred in sustaining a regulation which leaves to courts and juries in criminal proceedings, the task of ascertaining the existence of a trade custom whereby "unprepared scrap" was defined and of ascertaining the nature or articles allegedly classified by the trade as "unprepared".

4. The court erred in refusing to find that CPR 5 unlawfully delegated the function of defining "unprepared scrap" to private individuals.

5. The court further erred in dismissing petitioners' complaint.

ARGUMENT

I

If Section 28(n) of CPR 5 be given the construction urged by the Government, no definition whatsoever of unprepared scrap is found in the regulation.

It must be noted at the outset that it is the peculiar position of the United States that Section 28(n) of CPR 5 does not purport to be a definition of "unprepared scrap". Mr. Holub states with reference to Section 28(n) that it "has always been taken to mean simply that in accordance with customary trade meaning, unprepared scrap does not include demolition projects" (R. 13). Mr. Holub says again, (R. 16) " . . . It seems important to make it clear that

Section 28(n) of the regulation is extraneous to this whole question."

If we correctly understand the position of the government (and we must assume that the United States will take the same position in the criminal proceeding against the petitioners as it does here) it is immediately apparent that nowhere in the regulation is found any definition whatsoever of the term "unprepared scrap", although the term is employed to establish a supposed category of scrap metal and to fix a ceiling price therefor. It is plain from the very divergence of the statements set forth in the affidavits in the record that the term "unprepared scrap" is not a word of art nor does it have any definitive trade meaning sufficient to apprise those subject to the regulation as to just what items of scrap are included in Grades 32-34 of CPR 5. If the government is correct in the construction it places on Section 28(n) there is no definition whatever of the critical term "unprepared scrap" in the regulation, and petitioners' challenge to the regulation, based on its failure to properly define that class of scrap must be sustained.

In the absence of any definition of the term, the regulation is similar to the statute of the State of Oklahoma which was before this Court in *Champlin Refining Co. v. Corporation Commission of the State of Oklahoma*, 286 U.S. 210, 76 L. Ed. 1063. The statute there involved prohibited the production of petroleum in such manner or under such conditions as to constitute "waste". The statute in question was a penal statute and in holding it unconstitutional for absence of any adequate definition of the practice therein forbidden, this court said at page 1082 of the Lawyers' Edition opinion (286 U.S. 242):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' ''

The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the act the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste . . .''

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. *It is not the penalty itself that is invalid, but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all.*'' (Italics added.)

In *Lanzetta* v. *New Jersey*, 306 U.S. 451, 83 L. Ed. 88, the appellant who had been defendant in the court below, challenged a New Jersey statute making it a crime for a person not engaged in any lawful occupation who had been previously convicted of a crime or disorderly conduct to be a known member of any "gang". Because of the complete failure of the state statute to adequately define the word "gang", the statute was held unconstitutional. This court said at page 893 of the Lawyers Edition opinion (306 U.S. 458):

> "The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

Of course, it is the further position of the government that the regulation itself defines "unprepared scrap" in that it somehow establishes that the "unprepared grades" are all those items which do not come within any of the so-called "prepared grades" (R. 12-13). In other words, it is apparently the contention of the government that any item of scrap which cannot be included within Grades 1 through 31 under the Specifications prescribed therefor in Section 23, must of necessity fall within the Unprepared Grades Numbers 32-34. *If this is a proper construction of CPR 5, it is strange that the framers thereof did not so state and, we submit, the failure of the regulation to be specific is in itself a defect which should be fatal in this proceeding challenging its validity.* Under Section 14 of CPR 5, a seller (and only a seller) was given the privilege of applying for a price on scrap grades not listed in the regulation. In view of this concession in the regulation itself that it did not cover all grades of scrap, it is difficult to see wherein it follows that any scrap item not included within the Specifications of Grades 1 through 31, was of necessity "unprepared scrap" and belonged in Grades 32 through 34.

II

CPR 5 does not, itself, define unprepared scrap except by the definition set forth in Section 28(n), wherein such scrap is defined as having its "Customary Trade Meaning."

Actually, a careful reading of CPR 5 discloses that the term "unprepared scrap" as used therein is purportedly defined in Section 28(n), wherein such scrap is defined as

having "its customary trade meaning". As pointed out above, it is the contention of the government, as shown by the affidavit of Mr. Holub, that Section 28(n) does not purport to be a definition of unprepared scrap. Mr. Holub states with reference to Section 28(n) that "has always been taken to mean simply that in accordance with customary trade meaning, unprepared scrap does not include demolition projects" (R. 13). That such is not a proper construction of that paragraph is apparent from the wording thereof. It is significant that Section 28 of CPR 5, is entitled "Definitions". Sub-paragraph (n) is only one of a number of similar sub-paragraphs, each defining the meaning of terms as used in the regulation. The fact that Section 28(n) states that unprepared scrap "shall have its customary trade meaning *and* shall not include . . ." indicates by the very use of the word "and" an intent to define "unprepared scrap". Had the meaning of the section been that urged by Mr. Holub, the words "shall have its customary trade meaning" could and would have been eliminated therefrom. To express such a meaning the paragraph simply would have read:

> "(n) 'Unprepared scrap'—the term shall not include such demolition projects as bridges, rail abandonments, vessels, and locomotives, cranes, freight cars and similar equipment on its wheels . . ."

The conclusion is inescapable that the regulation purported to define "unprepared scrap" by reference to some purported trade custom.

The opinion of the Emergency Court of Appeals indicates an understanding by that court that Section 28(n) was intended to provide a definition of "unprepared scrap". The opinion makes it plain that in the view of that court the United States will be required to prove at the trial of the criminal action the nature and existence of the custom

on which it relies and knowledge of which is imputed to petitioners (R. 51, 52).

III

CPR 5, by the terms of Section 28(n) thereof, unlawfully and unconstitutionally delegates the function of defining "Unprepared Scrap" to private individuals.

It is impossible to ascertain from the regulation itself whether the "customary trade meaning" referred to in Section 28(n) was one in existence at the time of promulgation of the regulation or whether the framers intended that whatever trade meaning was in effect at the time of a particular transaction should control. If the latter be the meaning of Section 28(n), CPR 5 has left to the trade itself the function of defining those items denominated by said regulation as "unprepared scrap". In any judicial proceeding where "trade custom" is considered, it is usually deemed to be the custom at the time of the subject transaction.

As has been established by the evidence there has been no definitive trade custom whereby the limits and dimensions of articles of scrap are fixed in one particular category known as "unprepared". There has been, at most, only a meaning given by the trade to the word "unprepared" which falls far short of fixing with any certainty the items of scrap to which that adjective is applied. The word "unprepared" has been used to mean only that as to a particular consumer, an item of scrap is not usable in his melting facilities without further preparation. In view of this meaning of the word, it is apparent that a definition of "unprepared scrap" as having its "customary trade meaning" is no definition at all. However, even if the regulation be construed to mean that the practices of a majority of the industry at the time of a particular transaction should be controlling, there has been an unlawful delegation of legislative power to private persons.

In *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 80 L. Ed. 1160, the Bituminous Coal Conservation Act of 1935 was held unconstitutional. That act provided that whenever the maximum daily and weekly hours of labor were agreed upon by the producers of more than two-thirds of the annual national tonnage production of coal and by the representatives of more than one-half of the mine workers employed, such maximum hours of labor should be accepted by all the code members. A similar procedure was employed to determine the minimum wages for the code members. Any producer of coal who failed to comply with provisions of the code so established was compelled to pay an excise tax on the coal produced. Although the statute was not a penal statute, the excise tax was held, of course, to be a penalty to enforce compliance with the code.

In holding the act unconstitutional and in referring to the power conferred on the majority of the members of the trade to inflict their will on the minority, this Court said at page 1189 of the Law Ed. opinion (298 U. S. 311):

> "The power confered upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business. The record shows that the conditions of competition differ among the various localities. In some, coal dealers compete among themselves. In other localities, they also compete with the mechanical production of electrical energy and of natural gas. Some coal producers favor the code; others oppose it; and the record clearly indicates that this diversity of view arises from their conflicting and even antagonistic interests. The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is neces-

> sarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclosed the question. *A. L. A. Schechter Poultry Corporation* v. *United States*, 295 U. S. 537, 79 Law Ed. 1584, 55 Supreme Ct. 837, 97 A. L. R. 947;"

So, in this case, even if the regulation be construed to mean that the custom prevailing amongst a majority of scrap metal consumers at the time of a particular transaction was that to be used to determine which items should be deemed "unprepared scrap" there has been an unconstitutional and unwarranted delegation of legislative power to a portion of an industry which may thereby affect and control the rights and business practices of the minority. It is established by petitioners' evidence and it is not disputed that the needs and melting facilities of consumers of scrap metal may and do differ widely (R. 23). Accordingly, those items of scrap which may be deemed "unprepared" likewise differ widely. Even if the existence of a trade custom as to size of scrap items denominated "unprepared" amongst the majority of consumers were to be conceded (which it is most emphatically not) this corporate petitioner should not be compelled to accept the changing standards of its competitors in any determination by them as to which items of steel scrap shall be deemed "unprepared". And how may individuals in the position of the individual petitioners here possibly familiarize themselves with the practices of other consumers of iron and steel scrap at the

time of a given transaction in order to be able to know what articles are currently regarded by the majority of the trade as "unprepared scrap"?

In *Wagner* v. *Milwaukee* (1922), Wisc. 410, 188 N. W. 487, a city ordinance provided that the prevailing wage to be paid to employees of contractors performing work for the city should be determined by "the wage paid to members of any regular and recognized organization of such skilled laborers for such skilled labor". It was held that the ordinance was unconstitutional in that it delegated to the labor unions the power to determine and fix prevailing wage scale for the city.

It is important to distinguish at this point between the practice attempted by CPR 5, and one which has concededly been held valid in other statutes and regulations. There is little doubt that the Director of Price Stabilization would have had the right to properly define a class of scrap to be designated as "unprepared scrap". Had a sufficient definition thereof existed in CPR 5, it would make little difference that the articles of scrap therein contained did not conform with exactitude to the items of scrap theretofore designated by this corporate petitioner as "unprepared". Unless the action of the Director of Price Stabilization had been arbitrary and capricious or had exceeded the powers given him, Northwest Steel Rolling Mills, Inc. would have been bound by such a definition. The point here made is that no such definition was made by the Director, the party to whom the duty of such definition was delegated. Rather, the Director abdicated and abandoned that duty to the trade at large.

Nor would the petitioners have had cause for objection had the Director of Price Stabilization named a particular existing trade custom (had one in fact existed) and made reference to a trade publication of a particular date wherein the limits and dimensions of the articles of scrap could be

found. In *Norman-Frink, Inc.* v. *Arnall* (USECA 1952) 196 F. (2d) 502, the court held a ceiling price regulation on automobiles valid where it established as a maximum price for any used automobile the highest price listed for such automobile in the January 1951 issue of the Used Automobile Guide used by the seller during a prescribed base period.

In *Brister & Koester Lumber Corp.* v. *Turney* (USECA 1949) 176 F. (2d) 843, appears another example of an acceptable practice in drafting regulations such as this one. In that case there was involved O.P.A. Maximum Price Regulation 19, wherein the grades and terms were defined as being based on the "1939 standard specifications . . . of the Southern Pine Inspection Bureau."

Had respondent here made reference to an existing standard and to a particular publication (had one existed) wherein such standard could be located, petitioners would have no quarrel with the regulation. In such a case, persons subject thereto could easily ascertain the nature of the articles for which maximum prices were established. In CPR 5, however, no reference is made to any existing trade publication wherein the term "unprepared scrap" was defined nor could any such reference have been made for the reason, as shown by the evidence, that that term has never been applied to any definitive classification of scrap items ascertainable and fixed. By leaving the definition of the unprepared grades of scrap to the industry itself and even to the individual consumers (under the meaning attributable to the term "unprepared scrap" as established by petitioners' evidence) the Director of Price Stabilization created a situation of hopeless confusion wherein it was impossible for those subject to the regulation to ascertain what items were referred to therein.

IV

The vagueness, indefiniteness and ambiguity of CPR 5 render it violative of the Fifth and Sixth Amendments to the United States Constitution.

Even if it be assumed that CPR 5 had reference to some purported trade custom in existence at the time of its promulgation, the trade meaning attributed to the term "unprepared scrap" (if it can be honored by the designation "custom") was such as established by the evidence as to amount to no definition whatsoever. It is impossible to ascertain from the regulation whether the standard referred to by the framers was one purportedly adopted by the majority of the industry, by the minority, or whether the standard was one to be ascertained by the practices of each individual consumer. If the standard intended was one established purportedly by the majority of consumers it is not indicated how a consumer in the position of the corporate petitioner or how the individual petitioners herein could possibly have familiarized themselves sufficiently with industry practices in general to have been cognizant of the standards accepted by the majority if such existed. Persons subject to the regulation should hardly be required to make an independent investigation of trade practices and to ascertain for themselves which standards were used by a majority of their competitors in order to determine whether or not a particular purchase at a particular price was permissible. It was the duty of the Director of Price Stabilization to define what he desired to punish, not to refer the citizen to a comprehensive study of economic and trade conditions in order to ascertain what acts were prohibited. To enforce this regulation would be like sanctioning the practice of Caligula who "published the law, but it was written in a very small hand, and posted up in a corner, so that no

one could make a copy of it." *Suetonius, Lives of the Twelve Caesars*, page 278.

In many instances this Court has struck down acts of Congress providing for criminal penalties where the terms thereof were more definite than those contained in this regulation. In *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89, 65 Law. Ed. 516, 520, the defendant had been convicted in the lower courts under an act which declared criminal the making of "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries". The act contained no definition of an "unjust or unreasonable rate" nor did it refer to any source where the measure of "unjust or unreasonable" could be ascertained. This court held that the act in effect required the court and jury to determine the standard of what constituted an unjust or unreasonable rate or charge and therefore held the same unconstitutional. The court said at page 520 of the Lawyers Edition (255 U.S. 89):

> ". . . to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimate of the court and jury."

In *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 58 Law. Ed. 1284, this court had before it the anti-trust law of the State of Kentucky prohibiting any combination having for its purpose or with the effect of fixing a price that was greater than the real value of the article. Subsequent Kentucky cases had declared that the "real value" of an article was the "market value under fair competition and under normal conditions". This court held that the statute was unconstitutional in that it required a combination to guess at its peril as to the real value of articles sold by it.

Referring to the defendants the court said at page 1288 of the Lawyers Edition opinion (234 U.S. 223):

> "To compel them to guess, on peril of indictment, what the community would have given for them (articles sold) if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." (Matter in parentheses added.)

In *Connally* v. *General Construction Company*, 269 U.S. 385, 70 Law. Ed. 322, the court had before it a penal statute requiring a contractor to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed". The court said in holding the law unconstitutional at page 328 of the Lawyers Edition report (269 U.S. 391):

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary nations of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law".

Further, the court said referring to the statute:

> "And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary—as in the present case it is alleged it does vary—among different employers and according to the relative efficiency of the workmen, though it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in

> itself or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guarantee of due process cannot be allowed to rest upon a support so equivocal."

So, in the case at bar, the statutory term "unprepared scrap" if it have any meaning in the trade, is one whose meaning is dependent upon the facilities of different consumers and whose meaning varies as those facilities and needs vary. As was said in the *Connally* case:

> "The result is that the application of the law depends not upon a word of fixed meaning in itself or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries . . ."

V

CPR 5 is ambiguous and establishes more than one ceiling price for the same scrap items.

It will be noted that the affidavit of the government's witness, Holub, and the opinion of the Assistant Administrator (R. 37) in this matter do not directly refute the evidence of petitioners as to the customary grade meaning of the words "unprepared scrap". Rather, the government inferentially takes the position that the "customary trade meaning" attributed to those words is not essential to a definition of the term and further states that even if the customary trade meaning be essential to a definition of the term as used in CPR 5, that according to that trade meaning, unprepared scrap has always been those items not falling within the Grades 1-31 explicitly defined in the regulation. This theory assumes that all consumers of scrap have

identical melting facilities and that those facilities are such that items of scrap falling within Grades 1 through 31, of the regulation are usable therein without further preparation. Such an assumption flies directly in the face of the evidence submitted by petitioners that the needs and melting facilities of scrap consumers differ widely (R. 23). It further is inconsistent with the evidence as to the melting facilities used by this corporate petitioner (R. 6-9) and it is significant that the government does not exclude the corporate petitioner from its class of standard furnace and foundry operations. It will be noted, therefore, that there is a basic ambiguity in the regulation nowhere resolved by the government evidence. Although prescribed prices are set forth therein for Grades 3 and 4 and Grades 11, 12, 13, 16 and 17, it is apparent, nevertheless, that scrap items coming within those listed grades may be "unprepared" as to the corporate petitioner and other consumers of scrap whose melting facilities require scrap of smaller dimensions than the maximum permitted for those grades. In such a case, is the purchaser of scrap permitted by the regulation to pay the larger prepared price prescribed for the grade? Or, because such scrap is "unprepared" as to him, must he pay the lower unprepared price? It will be noted that the opinion of the Assistant Administrator assumes that in such an instance the consumer is entitled to pay the larger price (R. 34). *However, the Regulation does not so state.* This ambiguity has another more serious effect in the pending criminal proceeding. The indictment charges petitioners only with purchasing "Grade 34 Unprepared steel scrap (being scrap other than material suitable for hydraulic compression)". No other or further definition of items allegedy purchased by petitioners is set forth. Is it the theory of the government that the scrap purchased by the corporate petitioner was "unprepared" because requir-

ing further preparation by petitioner even though complying in every respect with one of the "prepared" Grades 1 through 31, or is it the theory of the government that the corporate petitioner purchased items of scrap exceeding even the dimensions of the Grades 1 through 31? The definition therein contained leaves ample room for the former contention and the fact that the wording of the regulation permits such an ambiguity to exist in the charge of an indictment phrased in its exact language amply demonstrates the uncertainties inherent in CPR 5 which are not resolved by any language found therein.

Summary and Conclusion

1. The position taken by the government to the effect that Section 28(n) of CPR 5 was not intended to provide a definition of "unprepared scrap" is sufficient ground alone for sustaining petitioners' challenge to the validity of CPR 5. Absent any definition of the term "unprepared scrap", the Regulation fails completely to fix any informing standard of criminality by which those subject thereto may be governed. The term is not a word of art nor does it have any established meaning in the trade sufficient to provide those persons subject to the regulation with an ascertainable standard of conduct:

(a) The contention of the government that the regulation elsewhere established inferentially that "unprepared scrap" is any scrap item not coming within the Specifications for Grades 1-31, is not borne out by the regulation itself.

(b) Nor can it be said from the evidence that the trade at large has customarily designated items not falling within the Specifications of Grades 1-31 as "unprepared". Petitioner's own furnaces and those of others similarly situated render many items falling within Grades 1-31 "unprepared" and it is not nor

could it be the position of the Government that the corporate petitioner is not a member of the "trade" subject to the regulation.

2. In fact, a fair reading of the regulation and Section 28(n) discloses that CPR 5 referred those subject thereto to "customary trade meaning" for a definition of unprepared scrap.

(a) If that trade meaning be construed to be whatever meaning was accorded the term "unprepared scrap" by the trade *at the time of a particular transaction,* CPR 5 unlawfully and unconstitutionally delegates a legislative function to private individuals.

(b) If on the other hand CPR 5 be construed to refer to some trade meaning allegedly given to the term "unprepared scrap" *at the time of promulgation of the Regulation,* CPR 5 is void for indefiniteness and ambiguity.

3. The very fact that the above difficulties exist in ascertaining the meaning of the regulation is ample reason for sustaining petitioners' contention that CPR 5 is so insufficient, vague and indefinite as to provide no foundation upon which to predicate a criminal proceeding.

It is respectfully submitted that Ceiling Price Regulation 5, insofar as it purported to provide a ceiling price for and a definition of the "unprepared grades" of scrap is invalid and unconstitutional and we respectfully request that the Petition for Writ of Certiorari herein be granted.

Respectfully submitted,

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